

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AMANDA DOUGHERTY, individually
and as a representative of a class,

Plaintiff,

V.

BARRETT BUSINESS SERVICES, INC.,

Defendant.

C15-1501 TSZ

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, United States District Judge:

(1) Plaintiff's motion to compel discovery, docket no. 52, and defendant's cross-motion for a protective order, docket no. 54, are each GRANTED in part and DENIED in part. Plaintiff seeks to represent a nationwide class of individuals as to whom defendant obtained a consumer report for employment purposes during the period from August 26, 2013, to the present. See Compl. at ¶ 50 (docket no. 1-1). Plaintiff claims that defendant did not properly obtain consent before procuring such consumer reports because it did not comply with the Fair Credit Reporting Act ("FCRA"), which requires that a "clear and conspicuous" written disclosure be made to a consumer before a consumer report is procured, "in a document that consists solely of the disclosure," indicating that a consumer report may be obtained for employment purposes. 15 U.S.C. § 1681b(b)(2)(A)(i). Such disclosure may be made on the same document in which the consumer authorizes the procurement of a consumer report. Id. at § 1681b(b)(2)(A)(ii). Plaintiff contends that the authorization form provided by defendant, which she signed, did not satisfy the FCRA's stand-alone disclosure requirement because it contained the following language:

I indemnify, release, and hold harmless the Company, any agents of the Company, or others reporting to or for the Company, any investigators, all former employers, reporting agencies, and all those supplying references and character references, from any and all claims, defamation, demands,

1 and/or liabilities arising out of, or related to, such investigations,
2 disclosures, or admissions.

3 Ex. 1 to Compl. (docket no. 1-1 at 17). The parties are currently engaged in discovery on
4 class certification issues. The deadline for filing a motion for class certification is
5 currently July 10, 2017. The Court has indicated that a scheduling conference will be set
6 after any motion for class certification is resolved, but that, in the absence of such
motion, the parties must file a Joint Status report by July 14, 2017. See Minute Order at
¶ 2 (docket no. 47). No deadline has been set yet for completing fact discovery. The
pending cross-motions concern plaintiff's Requests for Production ("RFPs") Nos. 4-8
and Interrogatories Nos. 2 and 4, which are addressed seriatim below.

7 (a) RFP No. 4: Plaintiff has requested a copy of "each version of any
8 document distributed" by defendant during the proposed class period that
9 "pertains to Background Information, Background Checks, and/or consumer
10 reports." RFP No. 4, Ex. B to Drake Decl. (docket no. 53-2) (emphasis added).
11 Defendant's objection to this request is SUSTAINED in part and OVERRULED
12 in part. To the extent that RFP No. 4 encompasses documents other than the
13 forms purporting to make the requisite FCRA disclosure or used to obtain the
14 necessary authorization to procure a consumer report, the discovery request is, at
15 this stage of the litigation, overbroad. In addition, because plaintiff's claim is
grounded on the inclusion of indemnification or release language in the disclosure
and authorization form she was given, she cannot serve as an adequate class
representative for individuals who might allege a different type of defect in other
forms used by defendant.¹ Plaintiff is entitled, however, to explore, for purposes
of determining the potential size, scope, and nature of any class, what other
disclosure or authorization forms defendant used during the proposed class period
that contained an indemnity, release, and/or hold harmless provision, inclusion of
which the United States Court of Appeals for the Ninth Circuit has recently held

16 ¹ Defendant has indicated that, before this litigation commenced, it did not use a standardized disclosure
17 or authorization form across all of its 57 branches throughout the United States. See Wiswall Decl. at ¶ 6
(docket no. 55). Rather, until recently, disclosure or authorization forms were generally prepared by the
18 various vendors that performed the requested background checks. See Gallo Decl. at ¶¶ 5-7 (docket
no. 56). For example, the form plaintiff signed when she applied to work for Merry Maids, a client of
defendant's Baltimore branch, was apparently supplied by Quick Search, a private investigation firm
based in Texas. See Ex. 1 to Compl. (docket no. 1-1 at 17). In connection with plaintiff's motion to
compel, plaintiff's counsel submitted two forms she obtained via the Internet that she believes illustrate
what she seeks in discovery. See Exs. A & F to Drake Decl. (docket nos. 53-1 & 53-6). Neither of these
forms, however, supports plaintiff's motion. The "Employment Background Authorization" form used by
defendant's client Enterprise Masonry Corporation, which plaintiff's counsel accessed at
<http://www.emcbrick.com>, indicates that it is or was used only to investigate criminal history; the box for
credit (or consumer) reports is not checked. See Ex. A to Drake Decl. The "Release Authorization" form
plaintiff's counsel downloaded from <http://www.gta-ride.com>, the website for the Grant County
(Washington) Transit Authority, does not contain any indemnification or release language, and thus,
further discovery regarding this form would not assist plaintiff in identifying individuals to whom she is
similarly situated.

1 constitutes a willful statutory violation, as a matter of law. *Syed v. M-I, LLC*, 853
2 F.3d 492 (9th Cir. 2017). Plaintiff's motion to compel a substantive response to
3 RFP No. 4 is therefore GRANTED in part, and defendant is DIRECTED to
4 produce to plaintiff, within thirty-five (35) days of the date of this Minute Order,
5 each version of each FCRA disclosure and/or authorization form actually used by
6 defendant and/or any of its vendors during the proposed class period to procure for
7 any of defendant's clients a credit or consumer report in connection with an
8 employment application.

9 (b) RFP No. 5: Plaintiff seeks “[a]ll documents including, but not
10 limited to, policies, procedures, materials, manuals, handbooks, instructions,
11 directions, or guidance that relate to . . . [defendant's] policies, practices or
12 procedures for obtaining and using Background Information, Background Checks,
13 and/or consumer reports.” RFP No. 5 (docket no. 53-2 at 11). Plaintiff's motion
14 to compel a substantive response to RFP No. 5 is GRANTED in part, and
15 defendant is DIRECTED to either (i) provide to plaintiff a written response
16 indicating that no policies, procedures, manuals, handbooks, or instruction sheets
17 of nationwide applicability, concerning the procurement of a credit or consumer
18 report in connection with an employment application, exist, or (ii) produce to
19 plaintiff any responsive documents of nationwide applicability within thirty-five
20 (35) days of the date of this Minute Order. In addition, with respect to each
21 branch for which forms responsive to RFP No. 4, as modified by the Court in
22 Paragraph 1(a), above, must be produced, defendant is DIRECTED to produce to
23 plaintiff, within thirty-five (35) days of the date of this Minute Order, any written
policy or procedure and/or any manual, handbook, or instruction sheet, which was
in effect in such branch during the proposed class period, concerning the
procurement of a credit or consumer report in connection with an employment
application. The Court is persuaded that plaintiff is entitled to such materials for
the purpose of assessing the commonality of putative class members' claims. See
Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

24 (c) RFP No. 6: This request, which asks for all documents that
25 defendant contends constitute the requisite FCRA disclosure and/or authorization,
26 is duplicative of RFP No. 4. Defendant's response to RFP No. 4, as modified by
27 the Court in Paragraph 1(a), above, shall be deemed also responsive to RFP No. 6.

28 (d) RFP No. 7: Plaintiff seeks all drafts of disclosure and/or
29 authorization forms and all documents relating to the creation or revision of such
30 forms. Defendant's objections are SUSTAINED in part and OVERRULED in
31 part. Because plaintiff's request is not limited by (i) when the drafts or documents
32 were generated, (ii) whether defendant, as opposed to one of its vendors, was
33 involved in the formation or editing process, or (iii) whether the form at issue was
34 ever used to procure a consumer report in connection with an employment
35 application, the Court is persuaded that RFP No. 7 seeks a substantial amount of
36 irrelevant (and potentially privileged) material, the production of which would be

1 burdensome and disproportional to its likely benefit and the needs of the case.
2 See Fed. R. Civ. P. 26(b)(1). Plaintiff's motion to compel a substantive response
3 to RFP No. 7 is, however, GRANTED in part, and defendant is DIRECTED to
4 produce to plaintiff, within thirty-five (35) days of the date of this Minute Order,
5 all drafts of the "Authorization Form" executed by plaintiff in connection with her
6 application to work for Merry Maids in Baltimore, if any exist and are in
7 defendant's possession, custody, or control.

8 (e) RFP No. 8: Plaintiff has asked for all agreements in effect during
9 the proposed class period between defendant and its various vendors that provide
10 consumer reporting services. Defendant's objections are SUSTAINED in part and
11 OVERRULED in part. The Court is persuaded that RFP No. 8 seeks a substantial
12 amount of irrelevant (and perhaps confidential) material, the production of which
13 would be burdensome and disproportional to its likely benefit and the needs of the
14 case. See Fed. R. Civ. P. 26(b)(1). Plaintiff's motion to compel a substantive
15 response to RFP No. 8 is, however, GRANTED in part, and defendant is
16 DIRECTED to produce to plaintiff, within thirty-five (35) days of the date of this
17 Minute Order, copies of all agreements in effect during the proposed class period
18 between any of defendant's branches and Quick Search.

19 (f) Interrogatory No. 2: This interrogatory demands that defendant
20 identify all of its branch offices, as well as all of the vendors used during the
21 proposed class period to conduct backgrounds checks, sorted by branch. Most of
22 the relevant information sought in this interrogatory will be available from
23 defendant's responses to RFP No. 4, as modified by the Court in Paragraph 1(a),
above. Plaintiff's motion to compel a substantive response to Interrogatory No. 2
is GRANTED in part, and defendant is DIRECTED to answer Interrogatory No. 2,
within thirty-five (35) days of the date of the Minute Order, by providing the
following items: (i) a list of the locations, by street address, city, and state, of
each of defendant's 57 branches; and (ii) a table of the materials responsive to
RFP No. 4, indicating the branch, vendor, and effective dates associated with each
of the various forms at issue.

24 (g) Interrogatory No. 4: This interrogatory, which asks defendant to
25 identify by Bates number each version of any document used during the proposed
26 class period that defendant contends constitutes the requisite FCRA disclosure or
27 authorization and to describe the time period during which and location at which
28 each such document was used, is duplicative of RFP No. 4, and will be deemed
29 answered when defendant provides to plaintiff the table required in Paragraph 1(f),
above.

30 Except as specifically granted in Paragraphs 1(a)-(g), plaintiff's motion to compel is
31 DENIED and, as to matters on which plaintiff's motion to compel is denied, defendant's
32 motion for protective order is GRANTED. The parties do not appear to have sought, and
33

1 the Court declines to award, any attorney's fees or costs in connection with these cross-
2 motions concerning discovery.

3 (2) Plaintiff's motion, docket nos. 60 & 62, to determine that defendant has
4 waived its attorney-client privilege with regard to certain documents is DENIED. The
5 Court is satisfied that the unredacted materials at issue, Exs. 2 and 3 to Drake Decl.
6 (docket nos. 62-1 & 62-2), are protected by defendant's attorney-client privilege, that the
7 materials were inadvertently produced to plaintiff, and that defendant has taken the steps
8 necessary to preserve its attorney-client privilege. Plaintiff is DIRECTED to return to
9 defendant, as soon as practicable and no later than seven (7) days after the date of this
10 Minute Order, all copies of the unredacted versions of Exhibits 2 and 3. Plaintiff will not
11 be permitted, absent prior approval of the Court, to use for any purpose the unredacted
12 versions of Exhibits 2 and 3 or any quotation, paraphrase, or summary of the privileged
13 contents thereof.

14 (3) The parties' stipulated motion to extend case deadlines, docket no. 72, is
15 DENIED in part and GRANTED in part, as follows. The parties' proposal to submit a
16 proposed case schedule at a later date is denied. The deadlines set forth in the Minute
17 Order entered December 20, 2016, docket no. 47, are EXTENDED as follows:

Deadline for completing discovery on class certification issues	July 14, 2017
Deadline for filing any motion for class certification	August 14, 2017
Deadline for filing a response to any motion for class certification	September 13, 2017
Deadline for filing a reply in support of any motion for class certification (and the noting date of any such motion)	September 29, 2017
Deadline for filing a Joint Status Report in the event that no motion for class certification is timely filed	August 18, 2017

18 (4) The Clerk is directed to send a copy of this Minute Order to all counsel of
19 record.

20 Dated this 18th day of May, 2017.

21 William M. McCool
22 Clerk

23 s/Karen Dews
Deputy Clerk